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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO. 636

DOROTHY B. McCREA, ET AL, *Petitioner*

vs.

HARRIS COUNTY HOUSTON SHIP CHANNEL NAVIGATION DISTRICT, ET AL, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on February 17, 1970.

CITATIONS TO OPINIONS BELOW

The District Court wrote an opinion called its "Memorandum and Order"; which appears, commencing at p. 559 and ending at p. 574 of the Record. Its judgment appears at p. 575 of the Record. The District Court's opinion is printed in Appendix A. The opinion of the Court of Appeals in *McCrea et al v. Harris County Houston Ship Channel Navigation District et al* appears at 423 F.2d 605. The Court of Appeals' opinion, judgment and order denying rehearing are printed in Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on February 17, 1970 (Record 595). Petition for Rehearing and Petition for Rehearing *en banc* was denied on April 13, 1970 (Record 596).

Associate Justice Hugo L. Black granted on July 8, 1970 an extension of time to and including September 8, 1970 within which to petition for writ of certiorari in this case, which order is printed in Appendix C.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Harris County Houston Ship Channel Navigation District is a common carrier by railroad within the meaning of 45 U.S.C., §51.

2. Whether the Harris County Houston Ship Channel Navigation District, in creating with companies admittedly common carriers by railroad, the Port Terminal Railroad

Association (a common carrier by rail that services exclusively the Harris County Houston Ship Channel Navigation District), also became a common carrier by railroad.

3. Whether the unloading of rail cars (both hopper and box cars) is an essential part of delivery by railroad.

4. Whether the common carriage services performed by the Harris County Houston Ship Channel Navigation District are performed by conveyor and not by rail, as stated by the Court of Appeals below.

5. Whether the Court of Appeals below erred in relying upon *Kelly v. General Electric Co.*, 110 F. Supp. 4 (E.D. Pa.), *aff'd.* 204 F.2d 692, *cert. denied*, 346 U.S. 692 (1953); *Tilson v. Ford Motor Co.*, 130 F. Supp. 676 (E.D. Mich. 1955); *Duffy v. Armco Steel Corp.*, 225 F. Supp. 737 (W.D. Pa. 1964), which hold that rail movement of one's own goods precludes a holding that such companies are common carriers by rail, when the facts are undisputed that the Harris County Houston Ship Channel Navigation District is moving the goods of others in interstate commerce by rail.

6. Whether the "express company" cases or "refrigerator car company" cases which for more than sixty years have been set apart and reliance cannot be placed thereon unless the instant case involves either an express company car or a refrigerator car.

7. Whether the Court's opinion in this case is in direct conflict with its own opinion in *Lone Star Steel Co. v. McGee*, 380 F.2d 640 (5th Cir.), *cert. denied*, 389 U.S. 977 (1967).

CONSTITUTIONAL PROVISIONS INVOLVED

45 U.S.C., §51—Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees.

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce, as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, §1, 35 Stat. 65; Aug. 11, 1939, c. 685, §1, 53 Stat. 1404."

49 U.S.C., §1(3)(a) "The term 'common carrier' as used in this chapter shall include all pipe-line companies; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire. Wherever the word 'carrier' is used in this chapter it shall be held to mean 'common carrier'. The term 'railroad' as used in this chapter shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term 'transportation' as used in this chapter shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. . . ."

STATEMENT

Mrs. Dorothy McCrea and her minor children, petitioners, sued the Harris County Houston Ship Channel Navigation District, respondent, for damages for the wrongful death of Herbert R. McCrea under the Federal Employers Liability Act, alleging that the respondent was a common carrier by rail in interstate commerce within the meaning of 45 U.S.C. §51.

FACTS SHOWING THE NAVIGATION DISTRICT TO BE A COMMON CARRIER BY RAILROAD FOR HIRE WITHIN THE MEANING OF THE FEDERAL EMPLOYERS LIABILITY ACT, 45 U.S.C. §51

The Navigation District was created, exists, functions and is regulated by the provisions of Article 8198 et seq. and Article 8263a et seq. of the *Revised Civil Statutes of Texas*, as amended. In the exercise of its statutory authority to operate a railroad belt, the Navigation District acquired and owns railroad right-of-way and approximately 150 miles of railroad trackage and right-of-way on either side of the Houston Ship Channel, Record 81. The Navigation District's management is in the Board of Navigation and Canal Commissioners consisting of a chairman, two members appointed by the Commissioner's Court of Harris County, Texas, and two members appointed by the City of Houston, Texas. Record 78.

PORT TERMINAL RAILROAD ASSOCIATION[1]

The Navigation District and the railroad companies serving the City of Houston in 1924 created the Port Terminal Railroad Association (hereinafter referred to as P.T.R.A.) to provide terminal and switching railroad facilities for the Port of Houston. The agreement has been amended since 1924, and the P.T.R.A. was operating in 1964 under the agreement as amended in 1956. The present members of the P.T.R.A. are the commissioners

1. The Port Terminal Railroad Association is admittedly subject to the Federal Employers Liability Act (Record 59-60), the Railway Labor Act (Record 476), the Safety Appliance Act (Record 495), complies with I.C.C. Rules and Regulations (Record 475), and has working agreements with railroad brotherhoods covering all applicable employees.

of the Navigation District and all the railroads serving the City of Houston. Record 80. There are six railroad members of the P.T.R.A. with voting power, and the Houston Belt and Terminal Railroad Association is a non-voting member of the P.T.R.A.

The over-all management of the P.T.R.A. is vested in its Board of Control, composed of five Navigation District Navigation and Canal Commissioners, and one executive from each of the six member railroads. Record 109. By the terms of the P.T.R.A. agreement, the Chairman of the Navigation District is Chairman of the Board of Control of the P.T.R.A. (Record 80) and the Executive Director of the Navigation District is Secretary of the P.T.R.A. Board of Control. Record 235. The Chairman of the Navigation District, in his capacity as Chairman of the P.T.R.A. Board of Control, executes the annual report filed by the P.T.R.A. with the Interstate Commerce Commission. Record 97. The day-to-day operations of the P.T.R.A. are supervised by an executive committee composed of executives from the member railroad lines (Record 79) but the Navigation District has the last word with respect to maintenance of the rails, right-of-way and capital improvements to the rail facilities. Record 110.

Under the agreement creating the P.T.R.A., the Navigation District contributed all of its railroad right-of-way, switches, trackage, yards and railroad-connected buildings, such as roundhouse, office buildings, yardmaster's tower and other miscellaneous buildings. Record 88-89. Except for certain trackage and facilities at the Houston Public Grain Elevator, the Navigation District Bulk Materials Handling Plant, the public wharves and the Navigation District Maintenance and Service Yard, the P.T.R.A. pays

to the Navigation District annually in an amount equal to five percent (5%) of an agreed valuation of the property contributed by the Navigation District to the P.T.R.A. Record 88.

The P.T.R.A. owns no railroad trackage, right-of-way, box cars, switches, bridges, hopper cars or railroad-connected buildings; it owns no locomotives or other railroad rolling stock other than two cabooses and one scrap car. Record 455. All locomotives used by the P.T.R.A. are assigned to the P.T.R.A. by member railroad lines. The P.T.R.A. has the exclusive right to operate over the tracks of the Navigation District. Record 137.

The total physical assets of the P.T.R.A. are valued at only $100,000.00. Record 211. The value of properties leased to the P.T.R.A. by the Navigation District is approximately eleven million dollars, which sum is the "rental base" from which the annual 5% rental paid the Navigation District by the P.T.R.A. is determined. Record 88-89.

All capital improvements and additions to railroad right-of-way, tracks, buildings and other rail facilities used by the P.T.R.A. are made by the Navigation District. The P.T.R.A. recommends to the Navigation District's Navigation and Canal Commissioners allegedly necessary capital improvements and additions, but the decision to make such improvements or additions rests exclusively with the Navigation District. The Navigation District by its own actions and at its own expense secures the necessary right-of-way and pays for the construction and installation of any capital improvements. Such railroad capital improvements are included in the expenditure of

proceeds from the issue of Navigation District bonds, both general obligation bonds and revenue bonds. Record 473-475.

NAVIGATION DISTRICT GRAIN ELEVATOR

The Navigation District owns and operates with its employees the Houston Public Grain Elevator at the Houston Ship Channel. Record 46. The grain elevator consists, essentially, of facilities for unloading grain from railroad cars (box cars and hopper cars), a six million bushel capacity grain elevator and a conveyor from the grain elevators to the ships for loading grain for export. Record 165. The main functions of the Houston Public Grain Elevator are storage and an essential link in the transportation of grain for export. A large percentage of grain handled by the Houston Public Grain Elevator has its origin outside the State of Texas. Record 166.

The Navigation District does not own any of the grain that is brought to the District's Houston Public Grain Elevator, but rather, the grain is owned by others (Record 103) and is elevated, stored and transferred by the Navigation District as a common carrier for hire.

The railroad facilities for unloading grain from railroad grain cars at the Houston Public Elevator consist of: five sets of railroad track known as the "Grain Elevator Yard" (Record 147), each of which will hold approximately fifty railroad grain cars (Record 487); three sets of railroad tracks leading to and through three dumper sheds; railroad switches; three dumper sheds containing the mechanical devides for removing grain from railroad box cars and hopper cars (Record 278-279); a holding area for emptied railroad grain cars, consisting of five

sets of railroad tracks (Record 487); pneumatic-tired tractors equipped with railroad draw bars for coupling to grain cars (Record 101), and air compressors and hoses for attachment to and operation of the braking system on railroad grain cars (Record 289); electrically operated winches and cables occasionally used by the Navigation District to move railroad grain cars onto and off of the dumping facilities. Record 287. The five sets of railroad tracks comprising the Grain Elevator Yard are maintained and repaired by the P.T.R.A. The switches narrowing the grain elevator yard's five tracks down to three tracks are maintained and repaired by the Navigation District (Record 100) and the value of those switches is not included in the P.T.R.A. rental base. Record 90. The value of the tracks leading from those switches to, through and beyond the dumper sheds is not included within the rental base (Record 90), those tracks are maintained and repaired exclusively by the Navigation District employees (Record 100) and are not used by the P.T.R.A. in any manner. Record 90. The dumper sheds and the mechanical dumping mechanisms therein are operated and maintained exclusively by the Navigation District's employees and are not within the P.T.R.A. rental base. Record 90. The pneumatic-tired tractors were purchased by the Navigation District for the sole purpose of moving rail cars in connection with unloading and loading grain and other cargo. Record 101. Upon order of the Navigation District, the P.T.R.A. moves railroad grain cars into the Grain Elevator Yard and spots them. Record 280. The Navigation District's pneumatic-tired tractors, operated by Navigation District employees, then move the railroad grain cars from the Grain Elevator Yard into the dumper sheds and onto the

mechanical dumpers or the hopper car dumping pit. Record 280. The Navigation District employee operating the tractor couples to ten rail grain cars, connects the tractor air brake to the braking system of the rail cars prior to moving such cars on railroad tracks into the dumper shed and onto the dumper. Record 153. On occasion, and particularly in the instance of the hopper car dumping pit, such railroad grain cars are moved onto the dumping facilities through the use of a cable and winch mechanism rather than by the pneumatic-tired tractor. Such cable and winch mechanisms are operated and maintained by Navigation District employees. When such cable and winch is used, a Navigation District employee will ride the grain car being moved onto the dumping facility and will set the brake on such car when the car is in proper position. A Navigation District employee will ride the first empty car to the holding area for empties and set the brake on such railroad car. The grain cars remain on railroad tracks throughout the grain unloading process. Record 287-288.

All rails, switches, dumping facilities and other equipment and machinery used in connection with grain unloading from the switches between the Grain Elevator Yard and the three tracks leading into the dumper sheds and a point some distance beyond the exit side of the dumper sheds are operated, maintained, repaired and controlled exclusively by the Navigation District. Record 99-100.

The Navigation District holds itself out as a public facility for unloading, elevating and conveying grain to ships for the purposes of export. It holds itself out to the public in soliciting such business, specifically, as being

a facility for the unloading of railroad grain cars. Record 105-106. It charges for its services according to published tariffs at the rate of 1-1/2 cents per ton for conveyance to a ship for export. Record 160-161. Included in the 1-1/2 cent tariff for unloading and elevating are the cost to the Navigation District of moving loaded railroad grain cars onto the dumping facilities, dumping such railroad grain cars, removal of such railroad grain cars from the dumping area, and the cost of such rails, switches and right-of-way, as well as their maintenance.

In addition to the Public Grain Elevator area rail facilities, the Navigation District owns an additional 11,000 feet of trackage in its Bulk Materials Handling Plant, which railroad track is excluded from the P.T.R.A. rental base and is maintained, repaired and used exclusively by the Navigation District and its employees. Record 227-229. The function of that trackage is generally the same as the Grain Elevator. Railroad cars loaded with bulk materials are brought to the Bulk Materials Handling Plant of the P.T.R.A. and spotted. The Navigation District then moves such cars with pneumatic-tired tractors to the point of unloading. Record 101. After the cars are unloaded, the tractors are used to move the cars to a point where they are picked up and moved out of the area by P.T.R.A. locomotives or switch engines. Record 102.

The Navigation District owns a number of locomotive cranes which are used at wharfside for the loading and unloading of railroad cars. Record 104. The cranes operate on railroad tracks, are equipped with regular railroad draw bars for coupling to railroad cars, and move such cars on the wharf apron and elsewhere incident to

such loading and unloading. Record 104. These locomotive cranes are moved from time to time from the north side of the Ship Channel to the south side (Record 104-105); however, the Navigation District must employ a locomotive engineer from the P.T.R.A. to accompany the regular locomotive crane operator, and pay the scale established by the railroad brotherhood labor contract to avoid a violation of the P.T.R.A.'s labor agreement with the brotherhood. Record 207-209. On occasions, when the P.T.R.A.'s employees have been on strike or respecting a picket line, the Navigation District has used its own locomotive cranes and its own employees to perform the switching of cars that would have been otherwise done by equipment and employees of the P.T.R.A. Record 212.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals' decision in this case is in direct conflict with this Court's decisions in *Union Stock Yard and Transit Company of Chicago v. The United States*, 308 U.S. 213 (1939), *Union Pacific Railroad Company v. F. H. Peavey & Co., Omaha Elevator Company, et al*, 32 S.Ct. 22 (1911), *Southern Pacific Terminal Company, et al v. Interstate Commerce Commission*, 219 U.S. 498 (1911), *Galveston Wharf Company, et al v. Galveston, Harrisburg & San Antonio Railway Co., et al*, 285 U.S. 127 (1932), *United States v. California*, 297 U.S. 175 (1936), and *United States v. Brooklyn Eastern District Terminal*, 249 U.S. 296 (1919) in holding that the Navigation District is not subject to FELA because the Navigation District does perform rail service in interstate commerce in the light of the undisputed evidence heretofore set out in necessary detail under "Statement".

2. The Court of Appeals' decision in this case is in conflict with its own decision in *Lone Star Steel Company v. McGee*, 380 F.2d 640 (5th Cir.), *cert. denied* 389 U.S. 977 (1967) in holding that the Navigation District's activities do not constitute rail services but rather that "its carriage services are performed by conveyor and not by rail." This holding, in view of the virtually undisputed facts, fails not only to grasp the impact of the Navigation District's role in participating in the creation, function and operation of the Port Terminal Railroad Association, but also, the extent, significance and necessity of the rail service performed daily by the Navigation District.

3. The Court of Appeals' decision in this case in analogizing the "situation" in this case to the three cases in which the courts have held that intraplant movement of goods by rail did not make the industries involved rail carriers under FELA *acknowledges* the validity of the distinction that in each case the company was engaged in the rail movement of its own goods, but apparently disregards the distinction. Obviously, the company in each of the three cases [*Kelly v. General Electric Co.*, 110 F. Supp. 4 (E.D. Pa.), *aff'd.* 204 F.2d 692, *cert. denied*, 346 U.S. 692 (1953); *Tilson v. Ford Motor Co.*, 130 F.Supp. 676 (E.D. Mich. 1955); *Duffy v. Armco Steel Corp.*, 225 F.Supp. 737 (W.D. Pa. 1964)] would not fit the test under FELA of being a common carrier by railroad unless the rail carriage is for hire to the public.

If the foregoing distinction is valid, the limited proposition for which the cases are cited, namely, that "the movement of rail cars does not invariably make one a railroad" is not appropos, because there can be no question but that each company would have been held a

common carrier by railroad had the companies been transporting the goods of others for hire. There can be no question but that the Navigation District makes a charge for moving by rail cars, unloading the rail cars, and elevating the grain owned by others.

4. The holding by the Court of Appeals that the Navigation District performs carriage services "by conveyor and not by rail" is in conflict with this Court's opinion in *Union Pacific Railroad Company v. F. H. Peavey & Co., et al, supra* (holding that elevation of grain is an integral part of the transportation by the rail carrier), and utterly disregards the movement of rail cars by the Navigation District to the dumper for unloading before the grain is elevated by conveyor to the storage bins, and moved from the storage bins for loading by conveyor to a ship.

5. The decision of the Court of Appeals in this case that "the movement of rail cars over a few hundred feet of track . . . is not a rail service" is in conflict with this Court's opinion in *Union Stockyards Case, supra,* (Union Stockyards did not move rail cars at all), and *Brooklyn Terminal Case, supra* and *Sioux City Stock Yards Case, supra,* where the distance of the movement of rail cars was found to be wholly immaterial.

6. The decision of the Court of Appeals in this case that "the passive ownership of railroad property from which it derives income does not make the Navigation District a railroad", citing *Robinson v. Baltimore & Ohio R.R.*, 237 U.S. 84 (1915), and *Edwards v. Pacific Fruit Express Co.*, 390 U.S. 538 (1968), misconceives the point. The *Robinson Case, supra,* simply held that an employee of the Pullman Company was not an employee of the Baltimore & Ohio Railroad. In the *Edwards Case,*

supra, Mr. Justice Black in delivering a unanimous opinion of the Court pointed out that "for sixty years the Federal Employers Liability Act has been administered with the understanding that refrigerator car companies are not included within the terms of the Act." While the *Robinson* and *Edwards Cases* may be read for the proposition cited by the Court of Appeals, the Navigation District is not a refrigerator car company nor is the petitioner seeking to make her deceased husband an employee of someone other than his true employer. The Navigation District's ownership of railroad properties by and in itself is more than passive ownership in that the entire system of operation at the Port of Houston clearly indicates that the Navigation District is in truth and in fact the "alter ego" of the P.T.R.A.

7. The decision of the Court of Appeals is in conflict with its own decision in the *Lone Star Steel Case, supra,* in that the Court below would require the relationship between the Navigation District and the P.T.R.A. to "approximate the control situation found in Lone Star" which is not the ultimate test as evidenced by this Court's opinion in *Union Stockyards Case, supra, Brooklyn Terminal Case, supra,* and *Sioux City Stockyards Case, supra.*

8. The recognition by the Court of Appeals that "The ambiguous nature of the Navigation District's operation permits a substantial argument that it is a 'strange but statutory railroad' " should indicate to this Court that there is a substantial basis for petitioner's contention and that it is manifestly unfair and unjust for the Port of Galveston, a neighboring city, in its operation to be treated differently from the Port of Houston as is now the case, evidenced by the *Southern Pacific Terminal*

Case, supra, and the *Galveston Wharf Company Case, supra.* Equal justice under the law demands and requires that this Court review the decision of the Court of Appeals to determine if there is any reason for finding and holding that the Galveston Wharves is subject to FELA, but that the Navigation District is not subject to FELA.

CONCLUSION

For the foregoing reasons, and others which counsel for petitioner has not had the vision and imagination to present, this petition for writ of certiorari should be granted.

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APPENDIX A

IN THE

United States District Court

FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. 66-H-303

DOROTHY B. McCREA, et al
V.
HARRIS COUNTY HOUSTON SHIP CHANNEL NAVIGATION DISTRICT, ET AL

MEMORANDUM AND ORDER

On August 18, 1964, at approximately 11:00 A. M., Herbert R. McCrea was killed when he fell into a concrete-lined pit which housed a hydraulic dumping device. The pit was owned by the defendant Harris County Houston Ship Channel Navigation District, and at the time of his death, Mr. McCrea was employed by the defendant, and was acting in the scope and course of his employment. Immediately before he fell, Mr. McCrea was using an air hose to blow loose grain, dust, and grease from the railroad tracks which led to defendant's grain elevator, to clean the area near the grain dumper, and to clean the grain dumper itself. The pit was open on three sides, and the floor adjacent to it had become slippery because of the presence of the grain dust and kernels and because of the humid atmosphere. The air hose Mr. McCrea was

using was 100 feet long and carried a pressure of 80 to 120 pounds per square inch. A portion of the hose fell into the pit, and as he attempted to pull it out, Mr. McCrea slipped and fell to his death.

Plaintiff, Mrs. Dorothy McCrea, the widow of the deceased, filed the instant action seeking to recover from the defendant Navigation District damages for wrongful death under the provisions of the Federal Employers Liability Act. Pacific Employers Insurance Company, the Navigation District's compensation carrier, was joined by Mrs. McCrea as a party defendant, and alternatively she sought recovery against it for the maximum compensation benefits allowed by Texas law. The parties agreed prior to trial that if Mrs. McCrea is found not to be entitled to damages under the federal act, then judgment should be entered in her favor on the basis of her alternative plea. After considering the evidence offered at trial in light of the applicable authorities, I am of the opinion that the Navigation District does not fall under the provisions of the federal act, and thus Mrs. McCrea is limited to the right of recovery accorded her by Texas law.

Insofar as relevant here, the federal act by its terms applies only to a "common carrier by railroad while engaging in commerce between any of the several states." 45 U.S.C. §51 (1964). It is undisputed that the Navigation District is engaged in interstate commerce, but I feel that plaintiff has failed to show that within the accepted meaning of the phrase the Navigation District is a "common carrier by railroad." In *Wells Fargo & Co. v. Taylor*, 254 U.S. 175 (1920), the Supreme Court defined in precise terms what is meant by that phrase. There the court stated:

> "In our opinion, *the words common carrier by railroad, as used in the Act, mean one who operates a railroad as a means of carrying for the public,—that is to say, a railroad company acting as a common carrier.* This view is not only in accord with the ordinary acceptation of the words, but is enforced by mention of cars, engines, tract, road bed and other property pertaining to a *going railroad.*" *Id.* at 187-88. (Emphasis Added.) See also *Tilson v. Ford Motor Co.*, 130 F.Supp. 676, 678 (E.D. Mich. 1955); *Kelly v. General Electric Co.*, 110 F.Supp. 4, 6 (E.D. Pa.), *aff'd*, 204 F.2d 692 (3d Cir.), *cert. denied*, 346 U.S. 868 (1953).

The Navigation District is a political subdivision of the State of Texas, its creation having been expressly authorized by statute. See Tex. Rev. Civ. Stat. arts. 8198, 8263 (1962). Its primary purpose has been to promote the smooth and efficient functioning of the Port of Houston, and 'it has been given broad powers to carry out that purpose.' Among other things, the Navigation District has for many years owned and operated a public grain elevator located at the Port and has been a member of the Port Terminal Railroad Association. It has been plaintiff's contention that the Navigation District's involvement in the Port Terminal Railroad Association when coupled with the activities it performs incident to the operation of its grain elevator bring it within the terms of this definition. Close scrutiny of the facts does not bear out the plaintiff's contention.

In 1922, the Navigation District entered into a contract with the City of Houston, whereby the City leased to the Navigation District certain wharves, docks, land, railway trackage, rights-of-way, and other property owned by the City which had been used in connection with the

operation of wharves and docks. In 1924, the Navigation District's involvement with the Port Terminal Railroad Association (PTRA) began when it entered into a contract with several railroad companies and affiliated groups which served the Port of Houston. Under the terms of the agreement, the Port Terminal Railroad Association was created for the purpose of operating interchange rail facilities around the Port area and providing certain switching services. Since that time, the PTRA has controlled and maintained most of the railroad trackage in the immediate Port area either by virtue of lease from the Navigation District or by ownership by the member railroads.

Since its creation, management of the PTRA has been vested in a Board of Control, which consists of one representative from each member railroad, of which there are now eight, and five representatives from the Navigation District. Although in terms of numbers the Navigation District has a weighted representation on the Board, each railroad has the power to cast one vote, while the Navigation District is limited to two votes on all matters which pertain to operation of the PTRA. Day-to-day operations of the PTRA are supervised by an executive committee which is composed of representatives from each of the member railroads. The Navigation District does not participate in decisions regarding day-to-day operations.

All trackage and railroad equipment leased from the Navigation District or volunteered for use by the member railroads is maintained at the expense of the PTRA. All revenues received and all expenses incurred by the PTRA are allocated solely among its railroad members. The Navigation District does not participate. All switch en-

gines and work equipment necessary for operation of the PTRA are furnished by member railroads. The Port Terminal Railroad Association is concededly subject to the provisions of the Federal Employers Liability Act, the Railway Labor Act, and the Safety Appliance Act. It also complies with the regulations of the Interstate Commerce Commission and has working agreements with most of the railroad brotherhoods.

The public grain elevator owned and operated by the Navigation District is located immediately adjacent to the railroad trackage over which the PTRA operates. Here, the Navigation District receives grain shipped from different parts of the country and bound for export. Inbound grain cars are delivered by employees of the PTRA to a siding located approximately 300 feet from the grain elevator. At this point, employees of the Navigation District take charge of the uncoupled cars and move them either by means of a winch or by a caterpillar tractor to the grain elevator. There the cars are spotted by the employees on a dumper, the dumper is activated, and the grain is unloaded. The empty car is then rolled down a decline for approximately 100 feet where the brake on the car is set, and it is later picked up by employees of the PTRA. No engines or locomotives are used in the operations, and none of the employees of the Navigation District are what might be termed traditional railroad employees such as firemen, engineers, switchmen, or brakemen. Movement of the rail cars along the 400 feet of track is performed only as a necessary adjunct to unloading the cars at the grain elevator.

Apparently, there have been no cases decided which may be said to be directly in point. Plaintiff relies primarily on language in cases decided by the Supreme

Court involving the common-carrier status of various companies under the Interstate Commerce Commission Act. In my opinion, these cases are inapposite and are clearly distinguishable.[1] The cases most closely in point are those relied upon by the Navigation District which deal with the question of whether a company's operation of intra-plant rail facilities subjects it to the provisions of the FELA.

In *Kelly v. General Electric Co.*, 110 F.Supp. 4 (E.D. Pa. 1953), the first of these cases, the General Electric Company owned two locomotives, 20 cars of rolling stock, and over two miles of railway trackage which were connected to the tracks of a common carrier. Rail cars destined for the General Electric plant were moved by employees of a railroad to a siding, where they were picked up by employees of General Electric, and thereafter they were moved and distributed throughout its plant by a switching engine. After the cars had been loaded or unloaded by General Electric employees, they were returned to a siding where they were again removed by employees of the railroad. The court rejected the plaintiff's contention that the operation by General Electric of these rail facilities constituted it a "common carrier by railroad."

> "A common carrier . . . [is] one who holds himself out to the public as engaged in the business of transportation of a person or property from place to place for compensation, offering his services to the public generally. The distinctive characteristic

1. Specifically, plaintiff relies on *Union Stock Yard & Transit Co. v. United States*, 308 U.S. 213 (1939); *Galveston Wharf Co. v. Galveston, Harrisburg & San Antonio Railway Co.*, 285 U.S. 127 (1932); *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498 (1911).

> of a common carrier is that he undertakes to carry for all people indifferently, and hence is regarded in some respect as a public servant." *Id.* at 6.

The General Electric holding was followed later in *Tilson v. Ford Motor Co.*, 130 F.Supp. 676 (E.D. Mich. 1955), where the Ford Motor Company operated certain rail facilities incident to its intra-plant operations. There, Ford owned tracks upon its own property, which it used to transport goods around its plant. Additionally, it used its track and its engine to transport sand to its plant from a large sand pile located about 1½ miles from the plant. Relying upon the *General Electric* case, the court held that these activities did not constitute Ford a "common carrier by railroad."

In *Duffy v. Armco Steel Corp.*, 225 F.Supp. 737 (E.D. Pa. 1964), Armco Steel Corporation owned and operated certain railroad equipment within its manufacturing plant. This equipment was used for the purpose of transporting material within the plant. All inbound railroad cars were delivered by a railroad to a siding within Armco's plant, and were then moved from place to place within the plant by Armco employees with use of a locomotive owned by Armco. All outbound railroad cars containing material and equipment were moved by an Armco locomotive to a siding within its plant, where they were then picked up by employees of the railroad. On the basis of these facts, the court held that Armco was not subject to the provisions of the FELA.

Plaintiff has sought to distinguish the holding in these cases on the ground that in each the company was moving its own goods whereas the grain moved by the Navigation District along its 400 foot of track belongs to others.

This, I feel, is not a meaningful distinction. In those cases dealing with the question of whether a freight forwarding company is a common carrier by railroad, for instance, the courts have unanimously held that the freight forwarder is not a common carrier by railroad, although freight forwarding companies move cars pursuant to loading and unloading operations and those cars are filled with goods belonging to others. See, *e.g., Republic Carloading & Distributing Co. v. Missouri Pacific Railway Co.*, 302 F.2d 381 (8th Cir. 1962); *Latsko v. National Carloading Corp.*, 192 F.2d 905 (6th Cir. 1951).

There are limits, however, beyond which a company or other entity may not go without becoming a "common carrier by railroad" within the meaning of the FELA. In *Lone Star Steel Co. v. McGee*, 380 F.2d 640 (5th Cir. 1967), the Court of Appeals for this circuit held that because of Lone Star's method of operation and its control of an operating railroad, the company was a "common carrier by railroad" subject to the provisions of the FELA. The criteria considered by the court in *Lone Star* are equally relevant here. There, Lone Star owned extensive properties near Lone Star, Texas within which it operated a plant for the processing and production of steel. Within the plant area, it had a complex system of railway trackage extending for several miles. It owned eight diesel electric locomotives, 94 cars of railroad rolling stock, and six railroad cranes. It also employed some 57 persons who were properly classed as switchmen, brakemen, engineers, firemen, and maintenance personnel.

Some 14 companies maintained their plant facilities within the Lone Star plant, and received shipments by rail from the T & N Railroad. Lone Star owned 3,308 of the 3,313 shares of the outstanding common stock of

the T & N, and for the preceding ten years had received over $2,000,000 in dividends. As a rail carrier, T & N was obligated to deliver rail cars to the consignee industries located within the Lone Star plant at sidings made available for that purpose, and to later pick up the outbound cars. It received compensation for this service through its line-haul charge. Lone Star, however, utilized its own railroad equipment to discharge this obligation of the T & N in regard to several of the companies located within the Lone Star plant. Based on all of these facts, the court, after noting the line of intraplant cases, found that Lone Star had gone beyond the permissible limits in operating its intra-plant rail facilities. In arriving at this conclusion, the court emphasized the following factors:

(1) That Lone Star controlled the T & N Railroad;

(2) That Lone Star owned and operated considerable railroad equipment;

(3) That Lone Star employed people in characteristicly railroad occupations;

(4) That Lone Star carried the goods of others for hire and received payment even though it was collected through its wholly owned subsidiary, the T & N Railroad; and

(5) That Lone Star had rendered a service which the T & N Railroad as a rail carrier had been obligated to perform.

The facts of the instant case are totally dissimilar. The Navigation District does not control or dominate the PTRA. It does not own or operate substantial railroad equipment, and it does not employ railroading personnel.

Moreover, its movement of rail cars at the grain elevator incident to unloading does not constitute the performance of a rail service, for the unloading of grain is not an obligation of a rail carrier, and delivery is complete when the grain cars are left at the siding adjacent to the grain elevator. *Secretary of Agriculture v. United States,* 347 U.S. 645 (1954); *Pennsylvania Railway v. Kittaning Iron & Steel,* 253 U.S. 319 (1920). See generally 13 Am.Jur. 2d *Carriers* §319, at 814 (1964). Neither alone nor taken together, do the activities of the Navigation District constitute it a "common carrier by railroad." *Edwards v. Pacific Fruit Express Co.,* ___U.S.___ (1968); *Lone Star Steel Co. v. McGee, supra.*

Therefore, for the foregoing reasons, it is ORDERED, ADJUDGED, AND DECREED that the action against the defendant Harris County Houston Ship Channel Navigation District be, and it is hereby, dismissed. It is further ORDERED ADJUDGED, AND DECREED, however, that the plaintiff have and recover against the defendant Pacific Employers Insurance Company in a lump sum, the maximum compensation benefits allowed by Texas law. Counsel for Pacific Employers Insurance Company will draft and submit an appropriate order.

This is a final judgment.

DONE at Houston, Texas, this the 2nd day of December, 1968.

JOHN V. SINGLETON, JR.
United States District Judge

True copy I certify
ATTEST:
V. BAILEY THOMAS, Clerk
By L. WIECH, Deputy Clerk

(Seal)

IN THE

United States District Court

FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. 66-H-303

DOROTHY B. McCREA, A WIDOW, ET AL

vs.

HARRIS COUNTY HOUSTON SHIP CHANNEL NAVIGATION DISTRICT, ET AL

ORDER

Be it remembered that on the 12th day of February, 1968, came on to be heard the above entitled and numbered cause and the parties continued to introduce evidence until the 15th day of February, 1968 when all parties announced in open court that they had rested their cases. Thereupon the Court considered the pleadings, the evidence, and the briefs of the parties and prepared and filed his Memorandum and Order dated December 2, 1968, which is incorporated by reference herein. In accordance with and in compliance with the findings of the Memorandum and Order dated December 2, 1968, judgment is entered that plaintiffs recover of and from defendant, Pacific Employers Insurance Company the

sum total of $12,600.00 in a lump sum plus $500.00 in funeral benefits as provided in Article 8306 Section 9 or a total of $13,100.00 in a lump sum. Judgment is also entered that plaintiff take nothing from Harris County—Houston Ship Channel Navigation District.

To which action of the Court plaintiffs Dorothy B. McCrea, et al, duly excepted, objected and gave notice of appeal to the United States Court of Appeals for the Fifth Circuit.

Entered and executed this the 30th day of December, 1968.

/s/ JOHN V. SINGLETON, JR
JOHN V. SINGLETON, JR.
United States District Judge

APPROVED AS TO FORM
AND SUBSTANCE:

BAKER, BOTTS, SHEPHERD & COATES

By: /s/ FINIS E. COWAN
FINIS E. COWAN, Attorneys
for Harris County Houston Ship
Channel Navigation District and
Pacific Employers Insurance Company.

APPROVED AS TO FORM ONLY:

BROCK & WILLIAMS

By: /s/ WARNER F. BROCK
WARNER BROCK, Attorney for
plaintiffs, Dorothy B. McCrea, et al.

APPENDIX B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 27499

DOROTHY B. McCREA, a Widow, Individually, and as Independent Executrix of the Estate of HERBERT R. McCREA, Dec'd, and JAMES A. McCREA, A Minor,

Plaintiffs-Appellants,

versus

HARRIS COUNTY HOUSTON SHIP CHANNEL NAVIGATION DISTRICT and PACIFIC EMPLOYERS INSURANCE CO.,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Texas

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(February 17, 1970)

Before GEWIN, THORNBERRY and AINSWORTH, Circuit Judges.

GEWIN, Circuit Judge: On August 18, 1964, Herbert R. McCrea, an employee of Harris County Houston Ship Channel Navigation District (Navigation District), was

killed when he fell into a concrete-lined pit, housing an hydraulic dumping mechanism used by the Navigation District in unloading grain from railroad cars. Mrs. Dorothy McCrea,[1] his widow, filed suit in the United States District Court for the Southern District of Texas seeking damages from the Navigation District under the Federal Employers' Liability Act.[2] Alternatively, Mrs. McCrea sought to recover the maximum compensation benefits allowed by Texas law from Pacific Employers Insurance Company, the Navigation District's compensation carrier.[3]

The principal question presented to the district court was whether the Navigation District which owns no locomotives[4] or cars, employs no typical railroad employees, operates no scheduled trains, and makes no direct charge for movement by rail is a "common carrier by railroad" as defined by FELA.[5] The ambiguous nature of the Navigation District's operations permits a substantial argument that it is a strange but statutory "railroad." The

1. Mrs. Dorothy McCrea prosecuted the suit individually and as executrix of her husband's estate. She was joined as plaintiff by James A. McCrea, a minor, and Jeannine McCrea Morris, both children of the decedent. On appeal their interests are identical and reference to Mrs. Dorothy McCrea as appellant, hereinafter, shall be deemed to include all of the above.

2. 45 U.S.C. § 51.

3. Appellant's right to recovery under the Texas workmen's compensation law has never been disputed and the parties stipulated that should the court deny appellant's claim under FELA, judgment should be entered against the compensation carrier for the maximum statutory death and funeral benefits.

4. The Navigation District does own and maintain a number of locomotive cranes which are leased to stevedoring companies for use at wharfside in loading and unloading vessels.

5. 45 U.S.C. § 51.

case was tried without a jury, and the court concluded that while the Navigation District was engaged in interstate commerce, it was not a "common carrier by railroad" and dismissed the FELA claim. Pursuant to an agreement by the parties,[6] judgment was entered against Pacific Employers for the maximum compensation and funeral benefits allowed by state law. We affirm the district court's dismissal of the FELA claim.

On appeal Mrs. McCrea contends that the district court erred in: (1) Dismissing appellant's claim under FELA. (2) Refusing to comply with appellant's request that it make separate findings of fact and conclusions of law. (3) Failing to include interest on the past due compensation installments in its judgment. (4) Failing to provide that the award would bear interest from the date of the entry of judgment.

I

The Navigation District is a creature of state law[7] and a political subdivision of the State of Texas operating terminal facilities at the Port of Houston. The direct link between the Navigation District and various rail carriers is a belt railroad operated by the Port Terminal Railroad Association (PTRA). An understanding of PTRA's organization and operation is necessary to a proper evaluation of the Navigation District's activities.

PTRA, an unincorporated association, was created in 1924 by an agreement between the Navigation District and six railroads which served the Port of Houston. It

6. See note 3 *supra*.

7. Article 8198, et seq., Article 8263a, et seq. Revised Civil Statutes of Texas.

was formed to provide interchange rail facilities and switching services to the railroads on an impartial basis. Management of PTRA is formally vested in a Board of Control, consisting of five representatives from the Navigation District and one representative each from the eight railroads currently participating in the association. However, on all matters relative to the operation of PTRA, each of the eight railroads may cast one vote while the Navigation District has only two votes. The Board of Control meets less than annually, and the day-to-day operation of the PTRA is controlled by an executive committee composed of representatives of the participating railroads.

PTRA owns property with an approximate value of $100,000. It leases property from the Navigation District including rights-of-way, trackage, switches, yards, and office buildings with a value between $10,500,000 and $11,000,000. PTRA pays the Navigation District 5% of the agreed value of the leased property annually as rent. The rolling stock and locomotives used by PTRA are furnished by the member lines, and it has the use of trackage in addition to that leased from the Navigation District under agreements with individual lines. The expenses of operating PTRA are borne by the member railroads on a pro-rata basis. PTRA makes no charge for movement of the cars of a member line, but does have a published tariff for moving cars for industries located in the area of its operation. PTRA is admittedly a common carrier by railroad and subject to FELA, as well as other federal rail carrier legislation.[8] On the other hand, it is

8. PTRA is admittedly subject to the Railway Labor Act, and the Safety Appliance Act. It also complies with I.C.C. Rules and Regulations and has agreements with various railroad brotherhoods.

not contested that the Navigation District and PTRA are distinct legal entities.

In its own operation, the Navigation District maintains certain railroad trackage at two facilities, a bulk materials handling plant and a public grain elevator.[9] The primary functions of these facilities is the unloading of incoming cargo, temporary storage, and conveyance of the cargo to vessels for loading. Any movement of railroad cars necessary to this unloading procedure is effected by employees of the Navigation District. PTRA equipment and employees do not operate on the property of the Navigation District.

Much of the testimony at the trial focused on the operations at the public grain elevator where the fatal accident occurred. At this facility, cars loaded with shipbound grain are delivered by PTRA to a siding approximately 300 feet from the elevator. From the siding, the cars are moved on to dumpers by Navigation District employees using either electrically operated winches and cables or pneumatic tired tractors as a motive force. The grain is unloaded by the dumping mechanisms and the empty cars are rolled down an incline approximately 100 feet to a holding area. There the brakes on the cars are set and they are picked up later by employees of PTRA. The grain is moved to wharfside by means of a conveyor.[10]

---

9. The Navigation District also maintains trackage at wharfside on which the locomotive cranes operate (see note 4 *supra*). Additional trackage is maintained in a service center, where material used by the Navigation District is retained. The trackage at the grain elevator, bulk materials handling plant, wharf apron, and service center is 'maintained' by the Navigation District in the sense that it is excluded from the lease of trackage to PTRA, and used exclusively by the Navigation District.

10. The testimony indicated that the same general unloading procedure is followed at the bulk materials handling plant.

A "common carrier by railroad" as used in FELA, ". . . mean[s] one who operates a railroad as a means of carrying for the public,—that is to say, a railroad company acting as a common carrier. This view . . . is in accord with the ordinary acceptation of the words. . . ."[11] This general standard was illuminated by this court in *Lone Star Steel Company v. McGee.*[12]

In determining that Lone Star was a common carrier by railroad and within the ambit of FELA, the court reviewed authority relevant to the present question and determined several considerations to be of prime importance:

> First — [whether there is] actual performance of rail service, second — [whether] the service being performed is part of the total rail service contracted for by a member of the public, third — [whether] the entity is performing as part of a system of interstate rail transportation by virtue of common ownership between itself and a railroad or by a contractual relationship with a railroad, and hence such entity

11. Wells Fargo & Co. v. Taylor, 254 U.S. 175, 187 (1920).

12. 380 F.2d 640 (5th Cir.), *cert. denied;* 389 U.S. 977 (1967). Lone Star Steel Company operated an extensive rail system within its industrial properties near Lone Star, Texas. It owned eight locomotives, 94 cars of rolling stock, six railroad cranes; and employed 57 persons in traditional railroad job classifications. In addition to the Lone Star plant, 14 independent companies maintained facilities within the Lone Star complex.

Rail service to the complex was provided by the T & N Railroad which was a subsidiary of Lone Star. By virtue of ownership of all but five shares of T & N's common stock, Lone Star had received in excess of $2,000,000 in dividends during the preceding ten years. Under its line-haul rates, T & N was obliged to pick up and deliver cars for industries located within the complex, at sidings located within the Lone Star plant. As to certain of these companies, Lone Star used its own railroad equipment to discharge T & N's obligation.

> is deemed to be holding itself out to the public, and fourth — [whether] remuneration for the service performed is received in some manner, such as a fixed charge from a railroad or by a percent of the profits from a railroad.[13]

In *Lone Star*, the steel company admitted that it performed rail services and the case turned on the last three considerations set out above. In the instant case, whether or not the Navigation District's activities constitute rail services is of central importance. In answering this question in the negative, the district court analogized the situation to three cases in which the courts have held that the intraplant movement of goods by rail did not make the industries involved rail carriers under FELA.[14] More importantly, the court noted that the unloading of inanimate cargo is not ordinarily a railroad function.[15] Thus, the court reasoned that the movement of rail cars over a few hundred feet of track, incident to the unloading process at the Navigation District's facilities, is not a rail service. While the Navigation District may be a common carrier of a type, and engaged in interstate commerce, its carriage services are performed by conveyor and not by rail.

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13. Id. at 647.

14. Kelly v. General Electric Co., 110 F. Supp. 4 (E.D. Pa.), *aff'd*, 204 F.2d 692, *cert. denied*, 346 U.S. 692 (1953); Tilson v. Ford Motor Co., 130 F. Supp. 676 (E.D. Mich. 1955); Duffy v. Armco Steel Corp., 225 F. Supp. 737 (W.D. Pa. 1964). Reliance on these cases is criticized by appellant on the ground that those companies were engaged in the rail movement of their own goods, and thus could not be *common* carriers by railroad. While there may be validity in this distinction, the cases are relevant for the limited proposition that the movement of rail cars does not invariably make one a railroad.

15. *See* Secretary of Agriculture v. United States, 347 U.S. 645 (1954); Pennsylvania Railway v. Kittaning Iron & Steel, 253 U.S. 319 (1920).

While this determination forecloses appellant's claim that the Navigation District is a rail carrier under FELA, consideration of the remaining *Lone Star* criteria reinforces the result reached by the district court. The services performed by the Navigation District are not a part of the total rail service contracted for by the public. The Kansas grain shipper, who appeared hypothetically throughout this case, does not receive the services of the Navigation District by virtue of his shipment contract with a railroad. The regular line-haul rate entitles the shipper only to transportation to the appropriate siding track. Independent arrangements must be made with the Navigation District and an additional charge paid in order to have the cars moved to the dumping mechanism and unloaded.

Appellant would have us attach considerable significance to the Navigation District's participation in PTRA. Initially it should be noted that the relationship between the Navigation District and PTRA does not approximate the control situation found in *Lone Star*.[16] PTRA is in fact controlled by its eight member railroads, and if characterization is necessary, PTRA is *their* alter ego. Further, the relationship between the Navigation District and PTRA is only relevant in determining whether the Navigation District holds itself out as a common carrier and cannot vicariously satisfy the requirement of actual performance of rail service which we have otherwise determined to be lacking.

The Navigation District makes no direct charge for the movement of rail cars incident to unloading. It charges

16. The absence of a control relationship between the Navigation District and PTRA also serves to distinguish the present case from Southern Pacific Terminal Co. v. ICC, 219 U.S. 498 (1911). In that case the terminal company, which was found to be subject to ICC regulation, was controlled by a railroad through stock ownership.

one and one-half cents for the elevation of a bushel of grain. Though its costs, including the cost of moving rail cars, are included in this rate, the same charge is applicable whether the grain arrives by rail or motor carrier. The Navigation District also receives a rental payment of approximately $550,000 annually for the property leased to PTRA. However, the Navigation District does not participate in either profit or loss by PTRA, and the passive ownership of railroad property from which it derives income does not make the Navigation District a railroad.[17]

After consideration of the circumstances of the Navigation District's operation by the light of *Lone Star*, we are convinced that the district court was correct in its determination that the Navigation District is not a "common carrier by railroad."

II

Appellant's remaining allegations of error concern the form of the district court's findings and the substance of the final judgment awarding compensation under Texas law. There is no merit in appellant's contention that the court erred in refusing her request that it make separate findings of fact and conclusions of law. The 1946 amendment to Rule 52(a) Fed. R. Civ. Pro. makes it clear that the requirements of that rule can be satisfied by a memorandum or opinion of the court.

Finally, appellant contends that the district court, in awarding benefits under Texas law, erred in failing to include interest on past due installments of compensation

17. *See* Robinson v. Baltimore & Ohio R.R., 237 U.S. 84 (1915); Edwards v. Pacific Fruit Express Co., 390 U.S. 538 (1968).

and interest on the judgment from the date of entry.[18] It does not appear that appellant objected to this failure in the court below. She made no motion to amend the judgment under Rule 52(b) Fed. R. Civ. Pro., no motion for a new trial, and approved the judgment as to form.[19]

From the record on appeal, it is impossible to determine why interest was not included in the judgment of the district court; whether it is attributable to clerical error, oversight, or a reasoned determination that such an award would be improper.[20] Consequently, we are of the opinion that the ends of justice would best be served by remanding this question to the district court. In the event that the district court should determine that an award of interest is proper under Texas law and that such an award was erroneously omitted, we hereby grant leave to amend the judgment to include such interest.

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18. Article 8306a of the Revised Civil Statutes of Texas provides:

> . . . [W]here suits are legally brought by any claimant or beneficiary under any of the provisions of this Act and recovery is had for past due weekly installments, such claimant or beneficiary shall be entitled to recover interest on such past due installments at the rate of four (4%) per cent, compounded annually. Any judgment rendered pursuant to any of the provisions of this Act shall bear interest from the date it is rendered until paid at the rate of four (4%) per cent, compounded annually.

19. Generally appellate courts will not consider issues raised for the first time on appeal. This principle is relaxed in cases where the question is one of law, and failure to hear it would result in a miscarriage of justice. American Surety Co. of N.Y. v. Coblentz, 381 F.2d 185 (5th Cir. 1967).

20. Appellee contends that in as much as it has never denied appellant's right to recovery of compensation benefits, has stood ready at all times to pay these benefits, and the benefits were refused by the appellant, any award of interest would have been improper. We are reluctant to consider this question of state law in the abstract with no findings in this regard having been made by the district court.

Accordingly, the judgment is affirmed insofar as it dismisses the claim against the Navigation District based on FELA. The case is remanded for appropriate proceedings with respect to the question of interest in accordance with this opinion.

AFFIRMED and REMANDED.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 27499

DOROTHY B. McCREA, a Widow, Individually, and as Independent Executrix of the Estate of HERBERT R. McCREA, Dec'd, and JAMES A. McCREA, A Minor,

Plaintiffs-Appellants,

versus

HARRIS COUNTY HOUSTON SHIP CHANNEL NAVIGATION DISTRICT and PACIFIC EMPLOYERS INSURANCE CO.,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Texas

---

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(April 13, 1970)

Before GEWIN, THORNBERRY and AINSWORTH, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1969

No. 27499

D. C. Docket No. CA 66-H-303

DOROTHY B. McCREA, a Widow, Individually, and as Independent Executrix of the Estate of HERBERT R. McCREA, Dec'd, and JAMES A. McCREA, A Minor,

Plaintiffs-Appellants,

versus

HARRIS COUNTY HOUSTON SHIP CHANNEL NAVIGATION DISTRICT and PACIFIC EMPLOYERS INSURANCE CO.,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Texas

---

Before GEWIN, THORNBERRY and AINSWORTH, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed insofar as it dismisses the claim against the Navigation District based on FELA; and that this cause be, and the same is hereby remanded to the said District Court for appropriate proceedings with respect to the question of interest in accordance with the opinion of this Court.

Costs will be borne three-fourths by plaintiffs-appellants and one-fourth by defendants-appellees.

February 17, 1970

Issued as Mandate: April 21, 1970

APPENDIX C

Supreme Court of the United States

No. _____, October Term, 1970

DOROTHY B. McCREA, ET AL., Petitioners,

v.

HARRIS COUNTY HOUSTON SHIP CHANNEL NAVIGATION DISTRICT, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 8, 1970.

/s/Hugo L. Black
Associate Justice of the Supreme Court of the United States

Dated this 8th day of July, 1970.

SUPREME COURT, U. S.

SEP 28 1970

E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM — 1970

NO. 636

DOROTHY B. McCREA, ET AL,

Petitioners,

v.

HARRIS COUNTY HOUSTON SHIP CHANNEL NAVIGATION DISTRICT,

Respondent.

REPLY TO PETITION FOR WRIT OF CERTIORARI

FINIS E. COWAN
Attorney for Harris County Houston Ship Channel Navigation District

Of Counsel:

BAKER, BOTTS, SHEPHERD & COATES
1600 Esperson Building
Houston, Texas 77002

FIDELITY PRINTING COMPANY, INC., HOUSTON

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IN THE

Supreme Court of the United States

OCTOBER TERM — 1970

NO. .....

DOROTHY B. McCREA, ET AL,

Petitioners,

v.

HARRIS COUNTY HOUSTON SHIP CHANNEL NAVIGATION DISTRICT,

Respondent.

REPLY TO PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondent prays that the petition for Writ of Certiorari be denied for the reason that the District Court and Court of Appeals for the Fifth Circuit have accurately and correctly decided this controversy.

CITATIONS TO OPINION BELOW

The opinions of the District Court and Court of Appeals correctly state the facts and the law applicable to this controversy.

QUESTIONS PRESENTED FOR REVIEW

The only real question in this controversy is whether the Harris County Houston Ship Channel Navigation District is a common carrier by railroad within the meaning of 45 U.S.C. § 51.

STATUTES INVOLVED

That portion of Petitioners' application appearing under the heading "Constitutional Provisions Involved" is misleading in that 49 U.S.C. § 1 (3) (A) is not involved in this case. This case involves 45 U.S.C. § 51. The definition contained in 49 U.S.C. § 1 (3) (A) has no relevance whatsoever to this cause and has never been relied upon by any Court to determine whether or not an entity is a common carrier by railroad within the meaning of 45 U.S.C. § 51.

The purposes of 45 U.S.C. § 51 and 49 U.S.C. § 1 (3) (A) are totally different and the decisions of the Courts in the refrigerator car cases, pullman car cases, freight forwarding cases and railway express cases would have been totally and entirely different had the definition contained in 49 U.S.C. § 1 (3) (A) been applicable to the Federal Employers Liability Act.

FACTS AND AUTHORITIES SHOWING THE NAVIGATION DISTRICT IS NOT A COMMON CARRIER BY RAILROAD WITHIN THE MEANING OF FEDERAL EMPLOYERS LIABILITY ACTS, 45 U.S.C. § 51.

The basic and controlling facts are accurately stated in the opinions of the District Court and the Court of Appeals. This portion of the reply will simply attempt to highlight certain inaccuracies appearing on pages six through seventeen of the Petition for Writ of Certiorari.

1. The Petition Overlooks the Principal Thrust of the opinions of the District Court and the Court of Appeals.

The principal thrust of these opinions is that in the ordinary acceptation of the word "railroad", the Navigation District is not a common carrier by railroad.

The Navigation District does not own or use locomotives or cars (R. 187), has no train schedules, issues no railroad tariffs or bills of lading (R. 203), operates no trains (R. 144), employs no firemen, switchmen or engineers or others having the usual classifications as railroad employees (R. 187), maintains no tracks or roadbed except for industrial sidetracks used in loading and unloading operations in the vicinity of the grain elevator and bulk materials handling plant (R. 144), does not in any manner hold itself out to the community as furnishing rail service (R. 103), and in fact furnishes no rail service. *Wells Fargo v. Taylor*, 254 U.S. 175 (quoted verbatim on p. 3 of the trial court's opinion) makes this apparent, surface-view important. The basic teaching of this early opinion, and the holding of the District Court and the Court of Appeals, in the case at bar, are basically to the effect that a "common carrier by railroad" is a "going railroad" with cars, engines, engineers, firemen, switchmen and trains.

Through the years, Labor Unions, Social Security Administrators, Federal Wage & Hour Administrators, the National Labor Relations Board, Railroad Retirement Act officials and others in the community generally have acted on the assumption that the Navigation District was not a "common carrier by railroad". The Navigation District does not withhold funds and contribute to the Railroad Retirement Board Fund, but on the contrary withholds Social Security payments and remits these to the Social Security Administrator. (R. 184). "Going railroads" remit withholdings to the Railroad Retirement Board and are not subject to social security. (R. 476, 257). The Navigation District, because it is an instrumentality in the State of Texas, has no labor union contract but has for many years withheld amounts from its employees and made voluntary payments on behalf of its employees to the International

Longshoremens Association Maritime Union and Vacation Fund (R. 258). The Navigation District has established for its employees a comprehensive series of benefits predicated on the assumption that the Navigation District is not a common carrier by railroad subject to the Railroad Retirement Act, but is an employer subject to the terms and provisions of the Social Security Act. (R. 184, 185).

In its fifty-five years of existence no one other than Mrs. McCrea and her lawyer have ever contended in a damage suit that the Navigation District was a common carrier by railroad. (R. 64).

The attitude of the community as a whole and the detailed complex arrangements made by the Navigation District with reference to the welfare and retirement — sickness plans of its employees should not affect a judgment of the Court if in fact the Navigation District is a common carrier by railroad; however, these long-standing practices, attitudes and methods of operations are relevant to determine whether, within the "ordinary acceptation of the words", the Navigation District is a "going railroad" or a "common carrier by railroad".

2. It is Inaccurate to State, as Petitioner Does, That the Opinions of the District Court and the Court of Appeals are Contrary to *Union Stockyard & Transit Company of Chicago* v. *The United States*, 308 U.S. 213 (1939), *Union Pacific Railroad Company* v. *F. H. Peavey & Company*, 32 S. Ct. 22 (1911), *Southern Pacific Terminal Company* v. *Interstate Commerce Commission*, 219 U.S. 498 (1911), *Galveston Wharf Company, et al* v. *Galveston, Harrisburg & San Antonio Railway Company, et al*, 285 U.S. 127 (1932), *United States* v. *California*, 297 U.S. 175 (1936), *United States* v. *Brooklyn Eastern District Terminal*, 249 U.S. 296 (1919) and *Lone Star Steel Company* v. *McGee*, 380 F. 2d 640 (Fifth

Cir.), Cert. Den'd. 389 U.S. 977 (1967) because in each of these cited cases the entity held to be a common carrier railroad did in fact perform a rail service.

Navigation District, under the undisputed evidence, performs no rail service.

Petitioners' basic argument is predicated on a faulty premise, to-wit: that the movement of rail cars of grain pursuant to unloading them is a rail service. The applicable authorities and the undisputed facts here reveal that the unloading of carload lots of intangible freight, such as grain shipped in to the grain elevator and the bulk freight shipped to the bulk materials handling plant, is not a "rail service" but is a non-railroad task which must be performed by the shipper or consignee. (R. 187, 191-192, 196, 197). A railroad cannot legally unload carload lots of inanimate freight or move cars in switching operations incident to such unloading without making a separate charge for such service in addition to the "line haul" rate. Performance of such service, without charge, would constitute an illegal rebate. (See authorities discussed *infra*).

Rail transportation of carload lots of inanimate freight ceases from an operational and from a legal standpoint when delivery is made upon the side track adjacent to the unloading facilty or adjacent to the plant to which the inanimate freight is consigned. (See authorities discussed *infra* and R. 191-197, 205, 496).

A shipper, by virtue of paying the line haul rate, is not entitled to have the rail carrier bring his carload of grain to the Navigation District's elevator, wait until the car may be placed upon the dumping platform and then push the car under the platform. The only service which the grain shipper may legally or customarily receive by virtue of pay-

ment of the line haul rate is delivery to the tracks adjacent to the grain elevator. When the carload of grain is delivered to the tracks adjacent to the grain elevator, delivery is accomplished, the obligations of the bill of lading are discharged, and the Navigation District assumes responsibility for the grain. (R. 191-197, 205, 496). A shipper must make a separate agreement with the Navigation District to elevate his grain and pay the Navigation District a specific fee for the act of elevating the grain. (R. 240). No separate charge is made and no separate fee is paid for the work of pushing or pulling the carload of grain on to the grain dumper. (R. 203, 263).

Stating the well established, universally accepted rule, Justice Frankfurter in *Secretary of Agriculture* v. *United States*, 347 U. S. 645 (1954) said:

> "The general rule is that it is the responsibility of the carrier, as part of the transportation service covered by the line haul rate, to 'deliver' the goods by placing them in such a position as to make them accessible to the consignee. Normally unloading is not a part of the delivery and is performed by the Consignee. . . . In the case of private sidings, the railroad's 'job ends' when it has placed the car on the Consignee's siding."

Petitioners' efforts to rely upon *Union Stockyard & Transit Company of Chicago* v. *United States*, 308 U.S. 213 (1939) and *United States* v. *Sioux City Stockyards Company*, 162 F. 556 (Ohio 1908) is misleading because the unloading of livestock, as contrasted to inanimate carload lots, is a rail service. The difference in the rules applicable to livestock is easily illustrated:

> ". . . The shipper or consignee has the duty to load and unload freight shipped in carload lots, or where for the shipper's convenience the car is to be loaded or unloaded or placed at his warehouse or on public tracks." 13 Am. Jur. 2d Carrier § 319, p. 814.

With reference to livestock, however, a different rule applies:

> "In the absence of an understanding or agreement to the contrary, a carrier has the primary duty to load and unload livestock, . . ." 13 Am. Jur. 2d Carriers, § 321, p. 816.

Union Pacific Railroad Company v. *F. H. Peavey & Company*, 32 S. Ct. 22 (1911) is distinguishable from the case at bar on the same grounds as the other cases discussed under this heading. The elevation of grain in that case was not truly an unloading operation but was elevation incident to and part of the rail transportation. The elevation was covered by the line haul rate and was necessary only because the railroad chose to transfer grain from smaller railroad cars to larger railroad cars in connection with a rail movement from western Kansas to New York. The shipper, in the Peavey fact situation, did not even know or need to know that the elevation occurred, did not pay for the elevation and the elevation occurred long before a delivery had been effected.

Petitioners' reliance upon *Lone Star Steel Company* v. *McGee*, 380 F. 2d 640 (Civ. App. 5th Cir. 1967) is likewise inapposite for the reason that Lone Star Steel Company in the *McGee* case obviously was performing a rail service. That case is not applicable to the case at bar for all of the reasons outlined in the District Court and Court of Appeals opinions.

3. It is Totally Inaccurate to State, as Petitioner Does on Page Sixteen of His Petition, That ". . . the Navigation District is in Truth and in Fact the 'Alter Ego' of the PTRA" because the PTRA is a separate and independent entity, Totally Independent of Navigation District Control and Domination.

The PTRA is a voluntary, unincorporated association formed in June, 1924 for the purpose of furnishing "impartial, efficient, unified and economical switching service by an independent and neutral organization, separate and distinct from the organizations of, but for the benefit of, the parties hereto, to serve the public on wharves, docks, elevators or other water terminal facilities and publicly owned railroad facilities now existing or hereafter constructed on or immediately adjacent to either side of the Houston Ship Channel . . . to thereby afford every railroad entering the City of Houston access thereto without discrimination so far as may be." (See p. 2 of agreement establishing PTRA.)

It is not factually accurate to state, as petitioner does on page seven of his petition that "the overall management of the PTRA is vested in its Board of Control, composed of five Navigation District commissioners and one executive from each of the six member railroads". On the contrary, the record is undisputed that the actual administration and control of the PTRA rests in a Railway Executive Committee composed of the executives from each of the railroad members of the PTRA. (R. 113, 174). The Railway Executive Committee, composed entirely of railroad employees, sets the policies and conducts all the operations of the PTRA. (R. 113). This Executive Committee, having no connection whatsoever with the Navigation District, employs and supervises the officials of the PTRA (R. 175), determines its operating policies, determines the compensation of the officials of the PTRA, schedules the movement of trains and arranges for the furnishing of locomotives and other movable rail equipment. (R. 113-116). The Navigation District has no control over the identity of the managing personnel of the PTRA, (R. 119, 176), has no voice in the compensation paid to the managers or the employees of the PTRA (R. 115), exercises no supervisory control

over either the managers or the employees of the PTRA, has no authority concerning operating decisions or the scheduling of trains on the PTRA. (R. 114-115).

Navigation District employees do not attend and have never attended the meetings of the Railroad Executive Committee. (R. 113). Navigation District is not normally advised of the activities, meetings and decisions of the Railroad Executive Committee. (R. 175). Navigation District officials do not even know the identity of the members of the Railroad Executive Committee. (R. 113). The two entities have separate employees and no common employees. (R. 45).

Navigation District does of course own the right-of-way and the tracks upon which the PTRA operates, but PTRA performs the actual maintenance work on the tracks. None of the employees of PTRA, including the maintenance employees, are supervised in any degree by Navigation District personnel. (R. 116).

The so called "Board of Control" of the PTRA is a figurehead body which meets less than once a year. (R. 109).

By the terms of the agreement covering the PTRA, all decisions of the so called "Board of Control" are made with the railroad members having five votes and the Navigation District only two votes, with the exception of decisions pertaining to capital improvements. (R. 79). The Navigation District's only power over the PTRA would be to refuse a request for a capital improvement. If such a refusal occurred, the member railroads could make any capital improvement themselves which they wished to finance. (R. 79, agreement establishing PTRA, and R. 470-473).

Petitioners' assertion that the so called "Board of Control" is in charge of the overall management of the PTRA

is inconsistent with the facts and inconsistent with the uncontradicted record to the effect that the so called "Board of Control" has never done anything, except to meet at irregular, widely spaced intervals. (R. 109). The voting arrangement on the Board of Control, wherein all voting power on matters relating to operation and maintenance is vested in the railroad members, and the functioning nature of the Railroad Executive Committee, makes it completely apparent that the Board of Control performs no real function and thus has no need of regular meetings.

The independence of PTRA establishes the inapplicability of cases such as *Galveston Wharf Company* v. *Galveston, Harrisburg & San Antonio Railway Company*, 285 U.S. 127 (1932) and *Southern Pacific Terminal Company* v. *Interstate Commerce Commission*, 219 U.S. 498 (1911), where the crucial fact in both of the Galveston cases was a railroad's actual control, domination and performance of the port function.

Petitioners cite no cases to support the position that the ownership of property used in a railroad busines makes the owner a railroad. As pointed out in the opinions, all the authorities hold contrary to petitioners' position.

CONCLUSION AND PRAYER

Respondent prays that the petition for Writ of Certiorari be denied.

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CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the foregoing has been forwarded to Mr. Warner F. Brock, The Main Building, Houston, Texas 77002 on this the 25th day of September, 1970.

Finis E. Cowan